CASE NO. 480
CHAMBER ONE
AWARD NO. 197-480-1

TOUCHE ROSS & COMPANY,
a Partnership,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

AWARD

Appearances:

For the Claimant: Mr. John Behrendt
Mr. Daniel Kolkey
Mr. William van der Feltz
Attorneys,
Mr. John Heil
Mr. Norman Grosman
Ms. Lucille Corrier
Representatives of Touche Ross & Company;

For the Respondents: Mr. Mohammad K. Eshragh
Agent of the Government of the Islamic Republic of Iran,
Mr. Ali Akbar Riazi
Legal Adviser to the Agent,
Mr. Haydar Ali Payandeh
Attorney, Ministry of Defence,

Mr. Ali Akbar Ostadifar
Mr. Ehsanolah Samimi
Representatives of the Ministry of Defence.

Also present: Mr. John Crook
Agent of the Government of the United States of America.

I. THE BACKGROUND TO THE CASE

a) The procedural history

On 18 January 1982 the Claimant ("Touche Ross"), a partnership organized under the laws of the State of New York, practicing accountancy, filed with the Tribunal a claim against the Respondent, the Islamic Republic of Iran, seeking payment of amounts allegedly due to it under Contract No. 115 ("the Contract") entered into between the Parties on 11 June 1977, for the provision of certain auditing services. The claim is, inter alia, for US $866,172 in respect of services rendered under the Contract prior to 25 June 1979. The Contract was cancelled by Touche Ross pursuant to its force majeure provisions on 17 July 1979. Touche Ross also claims costs of US $8,675 for attending a subsequent meeting between the Parties in Tehran.

On 2 November 1982 the Respondent filed a Statement of Defence and Counterclaim, in which it sought, inter alia, to recover contractual payments made to Touche Ross of US $1,177,886 on the grounds that the latter had improperly terminated the Contract. It also sought to recover social security liabilities.

In the course of the proceedings before the Tribunal, a schedule was laid down for the filing of evidence by the Parties. Touche Ross filed its evidence on the merits on 2 August 1983 and

6 October 1983, and evidence as to its United States nationality and standing on 15 September 1983. The Respondent did not file any evidence before the hearing, which took place on 19 October 1983.

At the hearing the Claimant sought, and was later granted, leave to amend the Statement of Claim to include a request for an order for the release of a letter of credit opened to secure the good performance guarantee in the Contract.[1]

The Respondent requested a continuation of the hearing and an opportunity to submit further evidence, but this was denied at that stage of the proceedings. In an Order of 11 November 1983, however, the Tribunal authorized the filing of a Memorial summarizing the Respondent's arguments on the issue of jurisdiction arising out of the "choice of forum" clause in the Contract. The Respondent filed such a Memorial and the Claimant filed a Response. The Respondent also renewed its request for a further hearing.

In the same Order of 11 November 1983, the Tribunal directed the Claimant to file copies of certain monthly progress reports referred to in the Contract. In response to that Order, certain documents were filed by Touche Ross and commented on by the Respondent. On 12 June 1984 Touche Ross filed a "Reply" to the Respondent's comments. This document in turn was the subject, first, of an objection to its filing, and subsequently of a "Supplemental Brief" and evidence filed by the Respondent on 7 March 1985. On 18 June 1985 Touche Ross requested that the filing of this latter document be disallowed.

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[1] Case No. 891, a claim brought by Bank Saderat Iran against the Government of the United States of America and Manufacturers Hanover Trust Co., New York, in respect of the same letter of credit, was terminated by Order of the Tribunal on 2 July 1985.

b) The interim measures

Proceedings against Touche Ross were commenced by the Iranian Ministry of Defence on 16 November 1982 in the General Court of Tehran seeking a declaration that the cancellation of the Contract was invalid, together with damages of one hundred million Rials. On 26 May 1983 Touche Ross filed a Motion with the Tribunal seeking interim measures of protection in the form of an order for the dismissal or stay of the Tehran court proceedings.

Finding that the claim filed by the Ministry of Defence in Tehran appeared to be substantially the same as the counterclaim previously filed with the Tribunal by the Islamic Republic of Iran, and observing that the subject matter of the counterclaim was excluded by virtue of Article VII, paragraph 2 of the Claims Settlement Declaration from the jurisdiction of the courts of Iran from the date of filing the counterclaim unless and until the Tribunal should decide that it had no jurisdiction over it, the Tribunal in its Interim Award No. ITM 22-480-1 of 13 June 1983 requested the Respondent "to take all appropriate measures to ensure that the proceedings before the General Court of Tehran be stayed ... at least until 1 September 1983".

Having received further briefs from the Parties, the Tribunal rendered a second Interim Award, ITM 26-480-1, on 17 August 1983, renewing its request pending the Tribunal's final determination of Case No. 480. On 21 May 1984, the 19th District, General Court of Tehran, issued a judgment ruling that the termination of the Contract for force majeure in accordance with its terms could not be considered a breach or failure to perform, though it left open the possibility of a separate suit being brought on the Contract should the Ministry of Defence "believe that [Touche Ross] has misinterpreted and misused the contents of the Contract". An appeal against the judgment has been filed.

Touche Ross renewed its request for an order for dismissal or stay of the Tehran action in a document filed on 12 June 1984.

c) Facts and contentions of the Parties

The claim in this case arises out of a contract that was part of the so-called "IBEX" project, to modernize and expand the Iranian Air Force's electronic intelligence-gathering system. The Air Force hired a number of contractors to design and construct various aspects of the system, to provide training, and to help manage the project. Pursuant to Contract No. 115, concluded on 11 June 1977, Touche Ross was the Audit Advisory Contractor for the project.

Touche Ross's tasks under the Contract were set out in a Statement of Work appended to the Contract. It required Touche Ross, inter alia, to audit, examine, review and analyse the financial plans, records and procedures of the various other contractors under the IBEX project, and to issue reports on a monthly and quarterly basis. In conjunction with representatives of the Respondent, Touche Ross was also required to review invoices submitted by the other IBEX contractors and make recommendations as to payment, and to participate in developing recommendations regarding other aspects of the management of the program. Touche Ross was also to prepare IBEX Cost Principles and Procedures Manuals for each IBEX contractor, and to determine the contractors' compliance with the manuals; to prepare and issue special reports related to contractors' financial matters; to evaluate contract change proposals; and within thirty days after the effective date of the Contract to prepare and submit a work plan and a financial plan including proposals for each contractor. Touche Ross was to provide an estimated 64,000 professional man hours over a period of 36 months, for an estimated total contract price of US $4,000,000 calculated on that number of hours worked. The Respondent was to issue payment certificates for works performed by Touche Ross, based on progress of work and against monthly invoices certified by the Respondent. Payment

certificates were to be issued within four weeks of their receipt, if there was no objection. The invoices certified for payment were then to be presented to a bank where a letter of credit had been established.

With the exception of attendance at progress meetings, almost all Touche Ross's duties under the Contract were performed in the United States, using data and documentation supplied to them by the several IBEX contractors under review. Touche Ross alleges that it proceeded to perform its obligations under the Contract and continued to do so without interruption through September 1978. Monthly reports were submitted, it claims, and invoices paid. Thereafter, it contends, it became increasingly difficult to obtain instructions from the Government of Iran as to the work required. Touche Ross claims that by the beginning of 1979 further performance had become almost impossible owing to the disruption occasioned by the Revolution and the impossibility of identifying or contacting persons responsible for the Contract who could give instructions as to the work to be done.

On 10 April 1979 Touche Ross gave written notice pursuant to Article 6.2 of the Contract, invoking the force majeure provision on the ground that further performance was impossible. Under Article 6.2, the Parties were then to consult with each other to find ways to deal with the force majeure conditions. If no mutually acceptable solution were found within three months, either Party had the option of cancelling the Contract by giving written notice to the other. Touche Ross's notice referred to Article 6.3 of the Contract which provided that force majeure was not to be considered as either breach of contract or negligence.

On 17 July 1979 Touche Ross gave written notice of cancellation pursuant to the force majeure clause, no mutually acceptable resolution having been reached between the Parties. The amount Touche Ross alleges it was owed as at that date for services rendered under the Contract to 25 June 1979 was $866,172. This

has been broken down into two main invoices which were submitted at a meeting of the Parties in August 1979 and which replaced previously submitted monthly invoices: No. 4376, showing $777,597 unpaid through 10 February 1979, and No. 4375 showing $88,575 unpaid for the period from 11 February 1979 through 25 June 1979, the date work finally ceased. The remainder of the claim consists of $8,675 in respect of expenses incurred by two Touche Ross representatives in attending a meeting with officials from the Iranian Ministry of Defence in Tehran in August 1979. This was the subject of a separate invoice, No. 4905, rendered in January 1980 but unpaid. The Claimant also seeks interest on these amounts, and costs of the arbitration. There is no claim for lost profits.

The Respondent disputes the claim, both as to the Tribunal's jurisdiction and as to the merits.

Three issues as to jurisdiction are raised by the Ministry of Defence, which filed pleadings on behalf of the Islamic Republic of Iran. First, it argues that Touche Ross, as a partnership, does not have capital stock and is therefore not capable of falling within the definition of a "national" of the United States laid down in Article VII, paragraph 1 of the Claims Settlement Declaration.

Second, at the hearing, the Respondent also argued that the departure of partners from the firm interrupted the continuity of ownership required by Article VII, paragraph 2 of the Claims Settlement Declaration, or that it at least required a pro rata reduction of the claim.

The third argument is that the claim is excluded from the Tribunal's jurisdiction by virtue of Article II, paragraph 1 of the Claims Settlement Declaration, as being "within the sole jurisdiction of the competent Iranian courts". The forum selection clause in Contract No. 115 provides as follows:

"8. Settlement of Differences

All differences and disputes which may arise between the two parties resulting from interpretation of the Articles of the Contract or the execution of the works which can not be settled in a friendly way, must be settled in accordance with the rules and laws of Iran via referring to the competent Iranian Courts."

Touche Ross denies that the jurisdictional provisions of the Claims Settlement Declaration require that an entity have issued capital stock in order to be a Claimant, and it states that under the firm's partnership agreement the claim has been owned continuously by the partnership, not the individual partners, and departing partners take no interest in it. Touche Ross also denies that the forum selection clause bars the Tribunal's jurisdiction under the Claims Settlement Declaration.

As to the merits of the claim, the Respondent disputes that there is any evidence that any services were performed by Touche Ross after September 1978. It denies receiving, or at any rate approving, any invoices after that time, and does not accept the Claimant's contention that invoices must be deemed to have been approved for payment unless disapproval was actually notified within four weeks. It also denies receiving after that time the monthly progress reports required by the Contract.

The Respondent points out that Touche Ross admits that it has been fully paid for its services through September 1978 and that it has not made any further demands in that connection. Thus, the Respondent contends that there is no justification for the inclusion of $330,682 in Touche Ross's Invoice No. 015-8921 dated 26 February 1979 as an adjustment of the balance due for the period of 26 July 1977 to 25 December 1978. Further there is no contractual basis for such a demand. In spite of the Claimant's having been fully paid for its services until October 1978, Touche Ross has made out new invoices for the prior months, which action also lacks contractual foundation.

The Respondent declines, in particular, to accept that any work could have been done by Touche Ross after 10 February 1979, the date on which all work was deemed by the new Government of Iran to have stopped. This date was communicated retrospectively to the Claimant in a letter of 16 July 1979, which also included an invitation to attend negotiations in August of that year. The Contract was cancelled by Touche Ross unjustifiably, in the view of the Respondent, and without reference to the offer of discussions. It disputes the existence of circumstances giving rise to force majeure such as to warrant cancellation of the Contract, and claims, instead, that Touche Ross's action in abandoning the project constituted a breach of contract. It also contends that Touche Ross's agreement to participate in discussions invalidated its earlier invocation of force majeure.

The Respondent raises a counterclaim asserting that Touche Ross breached the Contract by improperly invoking force majeure and cancelling the Contract. It seeks recovery of US $1,177,886 paid to Touche Ross on previously submitted invoices, plus interest. It seeks, in addition, an estimated amount of US $1,200,000 for damages and lost profits resulting from the Claimant's failure to discharge its obligations, together with interest and costs. It further seeks damages for losses incurred in connection with disruptions which it states occurred in the work of eighteen other contractors as a result of the Claimant's abandonment of the project, and in this connection the appointment of an expert is sought.

There is also a counterclaim for Rials 11,948,280 in respect of unpaid premiums due to the Social Security Organization in respect of the period from 11 June 1977 to 3 November 1981, including penalties for delayed payment.

Touche Ross denies liability on each counterclaim. It contends that work on the various IBEX contracts was disrupted by events surrounding the Revolution, and not by any action of Touche Ross. It denies any liability for social insurance premiums as

almost all the work under the contract was performed, not in Iran, but in Los Angeles.

II. REASONS FOR AWARD

1. Jurisdiction

a) The partnership as Claimant

Article VII, paragraph 1 of the Claims Settlement Declaration defines a "national" of Iran or the United States as, inter alia,

> "a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock."

In its Interlocutory Award No. ITL 37-111-FT of 6 April 1984 in International Schools Services, Inc. (ISS), and National Iranian Copper Industries Company (NICIC), the Full Tribunal stated that such a definition

> "expressed the required links between such entities and their States of organization most flexibly, extending the Tribunal's jurisdiction to all forms of corporations and other legal entities, regardless of whether they were organized for profit or whether they have issued capital stock." (at p.9)[2]

The categories of "other legal entity" were held, in that case, to include a non-profit corporation. The links of nationality

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[2] Further, as President Lagergren stated at page 3 of his Dissenting Opinion in the same case, an interest "equivalent" to fifty per cent of capital stock is "most likely to be found in partnership."

are even more clearly ascertainable in the case of a partnership such as here. The Tribunal has acknowledged the right of a limited partnership, also established under the laws of the State of New York, to file a claim in Award No. 37-172-1 of 15 April 1983 in Queens Office Tower Associates and Iran National Airlines Corp. (In that case the Respondent raised no objection to suit by a partnership.)

The Tribunal therefore rejects the Respondent's contention that a lack of capital stock precludes Touche Ross from bringing a claim. Provided it can establish a level of participation by nationals of the United States sufficient to demonstrate the required link with that country, the fact that it is a partnership has, per se, no adverse effect.

The partnership was organized under New York law, and under that law has the capacity to sue and be sued.[3]

Evidence adduced by Touche Ross in response to the Tribunal's request demonstrates that at the end of the fiscal year ending on 31 August 1980, the year the claim arose, there were 665 partners, 99% of whose addresses were in the United States. One year later, on 31 August 1981, there were 675 partners, 99% of whose addresses were in the United States. It was stated at the hearing that, from the time the claim arose to 19 January 1981, there were only a few non-United States nationals among the partners. It thus appears to the Tribunal a reasonable inference that "an interest ... equivalent to fifty per cent or more of its capital stock" is held by "natural persons who are citizens" of the United States.

It was suggested by the Respondent that a pro rata reduction should be imposed on the claim in respect of departing members of the firm during the period since the claim arose, or that the

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[3] See New York Civil Practice Law and Rules, Section 1025

departure of partners interrupted the continuity of ownership required by the Claims Settlement Declaration. The Tribunal cannot accept this proposition. Under the partnership agreement, the ownership of the partnership's assets remains unaffected by the withdrawal or admission of individual members.

b) The "choice of forum" clause

The remaining issue as to the Tribunal's jurisdiction concerns the "choice of forum" clause in the Contract. In order to be excluded from the Tribunal's jurisdiction by virtue of Article II, paragraph 1 of the Claims Settlement Declaration, a clause must "specifically" provide that "any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position".

It happens that the present clause employs language identical in all material respects to that already adjudicated upon by the Full Tribunal in Interlocutory Award No. ITL 6-159-FT of 5 November 1982 in Ford Aerospace and Communications Corporation et al. and The Air Force of the Islamic Republic of Iran et al. In that Award, the Tribunal held that the express limitation of the provision to disputes arising from the interpretation of the Contract and the execution of the works removed it from the scope of the exclusion. The Tribunal reaffirms this reasoning in holding that it is not prevented by the wording of Article 8 of the present Contract from asserting jurisdiction over all claims arising under the Contract.

c) The proceedings in the General Court of Tehran

The procedural history of the action pursued by the Ministry of Defence against Touche Ross, and the Tribunal's response to it, have been discussed above. Touche Ross has, in a document filed on 12 June 1984, renewed its request for relief against the continuation of the proceedings in Tehran, currently the subject of an appeal by the Ministry of Defence.

Since, in this Award, the Tribunal is rendering a final decision on its jurisdiction over, as well as the merits of, the respective claims and counterclaims, the interim relief granted in its previous Interim Award, ITM 26-480-1, expires by its own terms. By virtue of the Tribunal's assumption of jurisdiction over the claims and counterclaims, they are, as of the date of their filing with the Tribunal, considered to be excluded from the jurisdiction of any other court. This consequence of Article VII, paragraph 2 of the Claims Settlement Declaration has been confirmed by the consistent practice of the Tribunal since Interim Award No. ITM 13-388-FT of 4 February 1983 in E-Systems, Inc. and The Government of the Islamic Republic of Iran. The Tribunal repeated this ruling in the context of the present case in the Interim Awards already referred to. The effect of the Tribunal's assumption of jurisdiction in the present case is that as of 2 November 1982, the date of filing of the Respondent's counterclaims with the Tribunal, the Tehran Court is no longer considered to have jurisdiction to deal with the subject matter of the claim which the Respondent brought before that Court on 16 November 1982. The judgment of the General Court of Tehran of 21 May 1984 is thus without legal effect, and any further proceedings in pursuance of the claim on which that judgment was based will likewise be without legal effect.

2. The Merits

a) Force majeure

Fundamental to the issue of liability is the question whether Touche Ross validly gave notice and later terminated the Contract for force majeure, or whether, as the Respondent contends, it abandoned the Contract in breach of its continuing obligations.

The process of disruption which led Touche Ross to take that step was a gradual one, beginning some time after September 1978 and culminating in the dismissal of Mr. Humphrey, the Ministry

of Defence's representative in charge of co-ordination of Touche Ross's work with that of the other American contractors, in February or March of 1979. From that date, Touche Ross found no-one who was in a position to relay further instructions to them. Work done afterwards was limited to what could be carried out in California with such data as was available, and consisted of completing existing projects and processing existing invoices to the best of Touche Ross's ability in an attempt to clear the tasks currently in hand.

The Tribunal has elsewhere acknowledged the existence in Iran at the time of the Revolution of circumstances amounting to force majeure such as to prevent parties from substantially performing their obligations. In Interlocutory Award No. ITL 24-49-2 of 27 July 1983 in Gould Marketing, Inc. and The Ministry of National Defence of Iran, it noted that, "[b]y December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By 'force majeure' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence" (at p.11). That Award also indicates that certain conditions of force majeure continued to exist in June 1979. In this case, the Tribunal finds that conditions of force majeure prevented Touche Ross's performance under the Contract at least until 17 July 1979.[4]

It seems clear that Touche Ross followed the correct procedure prescribed by Article 6 of the Contract, giving notice on 10 April 1979 pursuant to Article 6.2 that force majeure was invoked as further performance was impossible. Despite the request for negotiations contained in the April notice, there is

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[4] See, also, Award No. 135-33-1 filed on 22 June 1984 in Sea-Land Service, Inc. and The Government of the Islamic Republic of Iran et al., at pp.22-24; Award No. 180-64-1 of 27 June 1985 in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, at pp.14-21.

no record of any communication between the Parties during the next three months. Touche Ross accordingly proceeded after a period of 90 days to send a letter of cancellation dated 17 July 1979.

Far from indicating disagreement with Touche Ross's evaluation of the situation, the letter eventually written by Colonel Eskandarzadeh on 16 July 1979 confirmed that "the accomplishment of all the works and expenditures under the Contract No. 115 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran," and that this state of affairs was deemed to date from 10 February 1979, i.e., two months before Touche Ross served its notice. It is reasonable to infer from this letter that performance was at least considered suspended from 10 February 1979 until the actual termination of the Contract by Touche Ross on 17 July 1979. It is clear that no further meetings of the committee which periodically evaluated the progress of work performed by Touche Ross were held during that time,[5] and it can be concluded that under the prevailing circumstances no such meetings could have been held.

As to the Respondent's allegation that Touche Ross was in breach of its obligations in invoking force majeure, the Contract itself expressly provides, in Article 6.3, that cancellation for force majeure "must not be considered as breach of Contract or negligence of Contract parties". As has already been observed, the Tribunal finds that Touche Ross acted correctly in accordance with the Contract in invoking force majeure.[6]

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[5] This is confirmed by Mr. Humphrey in his Affidavit.

[6] It is interesting to note that the General Court of Tehran, in its judgment of 21 May 1984, stated that Touche Ross had relieved itself of any liability for breach by exercising its right to terminate for force majeure.

Nor does it appear to the Tribunal that the invocation of force majeure was revoked by the participation of Touche Ross in the meeting with representatives of the Iranian Air Force and others in Tehran on 27 August 1979 or through the letter written on 18 September 1979 by Touche Ross to Colonel Eskandarzadeh canvassing the possibility of a future working relationship. Before the earlier of these dates, the Contract had already been validly terminated by Touche Ross's letter of 17 July 1979. Only after that letter was sent did Touche Ross receive the letter of 16 July 1979 which confirmed the cessation of work and contained an invitation to send an authorized representative for "contractual negotiations" in Iran in August.

The Minutes of that meeting, prepared by the Respondent and subsequently filed in the Tehran court proceedings, do not record that the Iranian representatives made any allegation of wrongful termination of the Contract on the part of Touche Ross. The Minutes do indeed confirm that work had stopped. Significantly, though, they further record quite clearly, that one of the main conclusions of the meeting was that invoices for work up to the date of the Revolution would be reviewed by the Respondent to determine whether they were payable.

As has been seen, two invoices summarizing work performed by Touche Ross prior to termination of the Contract, and reflecting amounts outstanding from previous invoices, were submitted at the August meeting. These were Invoice No. 4376 for $777,597 in respect of work performed through 10 February 1979, and Invoice No. 4375 for $88,575 in respect of work performed between 11 February and 25 June 1979.

An ambiguity exists in the pleadings of Touche Ross as to whether any amount is now claimed in respect of the month of September 1978. In the Statement of Claim, it is stated that Touche Ross "received payment for its services under the Contract... through September 1978." The Reply to Statement of Defence characterizes the claim as for "inter alia, $866,172 for

services rendered under the contract from October 1978 to June 25, 1979..." A further statement was made at the hearing to the effect that invoices were paid in full "to September 1978".

In the view of the Tribunal the question can be resolved by examining the amount claimed in Invoice No. 4376 up to 10 February 1979, i.e., $777,597. Touche Ross has filed a "Summary of Time Charges and Expenses for Contract No. 115" giving monthly figures of actual chargeable time spent from 26 July 1977 through 10 February 1979. Each of these figures exceeds the level of the corresponding invoice for each month. The difference is accounted for partly by items which were "unbillable" under the Contract, and partly by application of "prepayments" of $80,000 and $144,023 held by Touche Ross. These amounts were evidently applied to supplement successive invoices starting with the first and continuing up to, and including, the one dated 28 August 1978, leaving an available balance of the "prepayments" at that date of $4,701. When this item is deducted from the total billable amounts for the period from 26 August 1979, the resulting balance is $777,597, i.e., the precise amount of Invoice No. 4376. This indicates that the amount of the claim included the month of September 1978. This conclusion is further supported by the fact that the latest invoice produced by the Respondent as having been certified for payment is the one dated 28 August 1978.

After the termination of the Contract, the four-week period during which objections were to be raised to invoices submitted was no longer applicable. The Tribunal considers, however, that Touche Ross should have been placed on notice of any objections within a reasonable time after the meeting at which the Respondent had renewed and confirmed its obligation to review invoices for work up to and including the date of the Revolution. The date of 31 October 1979 appears, in the circumstances, to be a reasonable limit to set on the Respondent's review. Since neither approval nor objections were communicated to Touche

Ross, the Tribunal considers that from 1 November 1979 the Respondent became liable to pay Invoice No. 4376.[7]

Further, Touche Ross has adduced evidence that it continued, albeit on a severely limited scale, to do what tasks it could after the Revolution in performance of what it still considered, correctly, to be its contractual obligations. The Tribunal finds that it was right to do so. While the valid invocation of force majeure provides a defense against a possible claim for breach of contract based on failure to perform, it does not, in the circumstances of this case, relieve the invoking party of the obligation to continue to do whatever is still reasonable to carry out its duties under the Contract. Consistently with its finding that the Contract subsisted until 17 July 1979, the Tribunal thus determines that the Respondent was under an obligation to review for payment Invoice No. 4375 which covers the post-Revolutionary period. Its failure to object to this invoice within a reasonable period raises the presumption that it was, or at any rate should have been, accepted. The Tribunal therefore finds that it, too, became payable on 1 November 1979.

The Tribunal concludes, therefore, that the Respondent is liable to reimburse Touche Ross for work performed under the Contract up to the date of termination, as reflected in the two invoices.

The remaining element of the claim relates to the expenses of Touche Ross in attending the meeting in Tehran in August 1979, and is reflected in Invoice No. 4905, of 10 January 1980, as $8,675. Though the meeting was convened at the request of the Respondent (initially in its letter of 16 July 1979) and its purpose was described as "contractual negotiations", the Tribunal finds no basis in the contract or elsewhere for holding

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[7] The documentation provided by the Parties has been reviewed by the Tribunal and appears to be consistent with the amount of this invoice.

the Respondent liable to bear such costs. Rather, since the object of the meeting was to re-establish contact and attempt to clear the way for a possible future relationship, it seems appropriate that Touche Ross should bear its own costs of attending.

b) The letter of credit

Article 7.1 of the Contract required Touche Ross to submit a bank guarantee equal to 10% of the total contract price as security for good performance. A bank guarantee was duly established, secured by a letter of credit (No. 148535) issued by Manufacturers Hanover Trust Company to Bank Saderat in the amount of $400,000.

Article 7.4 of the Contract provides that in the event of cancellation due to force majeure, "all Bank Guarantees of good performance of work will be immediately released". Despite requests on the part of Touche Ross to acknowledge release of the bank guarantee subsequent to termination on 17 July 1979, the Respondent refused to do so. While Touche Ross's Statement of Claim merely referred to possible consequential damages arising out of this refusal, it was explained at the hearing that an attempt had been made by the Respondent to draw upon the letter of credit, but that an injunction had been obtained restraining this step in court proceedings in New York. Touche Ross accordingly requests the Tribunal to order the release of the letter of credit as part of its Award in this case, and to grant consequential damages in the amount of the letter of credit in the event of its being required to make payment.

The Tribunal finds that, since the Contract was terminated and there was no performance to be guaranteed thereafter, the bank guarantee and the letter of credit have no further purpose. Pursuant to the force majeure provisions of the Contract, the Respondent is obliged to withdraw its demand for payment, and to refrain from making any further demands thereon. It is further

obliged to cancel the bank guarantee and release the letter of credit.

c) The counterclaims

The Respondent initially raised three counterclaims, described above, based on the premise that Touche Ross was in breach of the Contract in giving notice of termination for force majeure. It sought recovery of amounts paid on invoices; damages and lost profits; and, specifically, damages incurred by virtue of the disruption to other contracts occasioned by Touche Ross's actions.

The Tribunal has set forth its analysis of the events leading up to the termination of the Contract, and has concluded that the invocation of force majeure was valid and thus not capable of giving rise to claims for damages against the party relying upon it. It follows from this that the Respondent's counterclaims in this connection must be dismissed.

In its Supplemental Brief containing comments on Touche Ross's submission of progress reports relating to Invoice No. 4376, filed on 7 March 1985, after the hearing, the Respondent raised for the first time the question of whether Touche Ross was in breach of contract not by virtue of its action in invoking force majeure, but because its prior performance had been defective and subject to unjustified delays which caused losses to the Respondent. Aside from the determination of whether or not this filing - to which Touche Ross has objected - could properly be characterized, or admitted by the Tribunal, as a counterclaim, the issues that it raises are answered by the Tribunal's finding that the Respondent had failed to review Invoice No. 4376 within a reasonable time.

There remains the counterclaim for Rials 11,948,280 in respect of Social Security premiums. This is supported by a single document, a letter from the Social Security Organization of the

Islamic Republic of Iran to the Ministry of National Defence dated 31 December 1981, stating that the indebtedness of Touche Ross "as computed on the basis of the total turn-over of US $1,177,886", covering the period from 11 June 1977 to 27 December 1981 and including penalties, amounted to the figure now claimed. There is no indication that a formal notice or demand had previously been served on Touche Ross, which denies any record of any such liability.

The Tribunal therefore dismisses this counterclaim on the ground that it is unsubstantiated. There is thus no need to address the jurisdictional questions of whether the claim arose out of the Contract itself or by operation of Iranian municipal law[8]; or whether, indeed, a claim was "outstanding" at all as at 19 January 1981, the date prescribed by the Claims Settlement Declaration.

d) Procedural matters

Two items of procedure remain outstanding. First, each of the Parties has objected to a post-hearing submission of the other. Although the submission by the Respondent to which the Claimant objects introduced new evidentiary material, the Tribunal has examined both filings and since the Tribunal does not rely on such material to reach this Award, concludes that no prejudice has resulted from the submissions such as to warrant rejection by the Tribunal.

Second, the Respondent continues to seek a further hearing. The Tribunal notes that ample opportunity was afforded to the

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[8] See, in this context, Award No. 180-64-1 of 27 June 1985 in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, at p.41; Award No. 192-285-2 of 4 October 1985 in General Dynamics Telephone Systems Center, Inc. et al. and The Islamic Republic of Iran et al., at p.25. See, also, Dicey & Morris, The Conflict of Laws, Tenth Edition, London, 1980, Vol. I, at pp. 89-94.

Parties to present their respective cases before and during the hearing held on 19 October 1983. Further submissions were invited from the Parties thereafter, and both availed themselves of this opportunity. Also, as noted, both Parties have filed additional submissions. The Tribunal perceives no need or justification to prolong these proceedings further.

e) Interest

The Tribunal considers it reasonable to award Touche Ross interest at the rate of 10% per annum on the principal sum awarded with effect from 1 November 1979.

f) Costs

The Tribunal considers that the Respondent should be obligated to pay Touche Ross reasonable costs in the amount of US $25,000.

For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

1. The judgment of the General Court of Tehran of 21 May 1984 is without legal effect, and any further proceedings in pursuance of the claim on which that judgment was based will likewise be without legal effect.

2. The bank guarantee issued by Bank Saderat pursuant to Article 7.1 of the Contract and Letter of Credit No. 148535 issued by Manufacturers Hanover Trust Company have no further purpose. The Respondent THE ISLAMIC REPUBLIC OF IRAN shall withdraw all demands for payment in connection with the guarantee and shall refrain from making any further demands thereon. The Respondent shall take all action necessary to ensure that Bank Saderat cancels the guarantee, releases the Letter of Credit, withdraws all

demands for payment made in respect of the Letter of Credit and refrains from making any further demands thereon.

3. The counterclaims of THE ISLAMIC REPUBLIC OF IRAN against the Claimant TOUCHE ROSS & CO. are dismissed.

4. The Respondent THE ISLAMIC REPUBLIC OF IRAN is obligated to pay the Claimant TOUCHE ROSS & CO. the sum of Eight Hundred and Sixty Six Thousand One Hundred and Seventy Two United States Dollars (US $866,172) plus simple interest at the rate of 10 per cent per year (365-day basis) from 1 November 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus costs of arbitration in the amount of US $25,000.

   This obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

This Award is hereby submitted to the President of the Tribunal

for notification to the Escrow Agent.

Dated, The Hague
11 October 1985

Gunnar Lagergren
Chairman
Chamber One

In the name of God

Koorosh-Hossein Ameli
Dissenting Opinion

Howard M. Holtzmann
Joining fully in the Award, except joining solely in order to form a majority as to (1) the award of only 10% interest, see my Separate Opinion in International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1, at 3-4 (10 Oct. 1985), and (2) the award of only $25,000 in costs, see my Separate Opinion in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).